Covenant Care California, LLC and Covenant Care La Jolla, LLC *and* Lerma Vera. Case 21–CA–090894

June 29, 2020

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On December 22, 2015, the National Labor Relations Board issued its Decision and Order in this proceeding, finding that the Respondents violated Section 8(a)(1) of the National Labor Relations Act (the Act) by (1) maintaining and enforcing a mandatory arbitration agreement that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial, and (2) maintaining a rule that prohibits discussion of terms and conditions of employment by requiring employees to keep information about arbitral proceedings confidential. *Covenant Care California, LLC*, 363 NLRB No. 80 (2015).

The Respondents filed a petition for review with the United States Court of Appeals for the Ninth Circuit. The appeal was stayed pursuant to successive orders by the Circuit Mediator for the court beginning June 2, 2016. On June 29, 2018, the court granted the Board's motion to (1) summarily grant the Respondents' petition to review the portion of the Board's decision dealing with the first above-stated finding in light of *Epic Systems Corp. v. Lewis*, 584 U.S. __, 138 S.Ct. 1612 (2018) (holding that employers may lawfully maintain arbitration agreements that contain class- and collective-action waivers and stipulate that employment disputes are to be resolved by individualized arbitration); and (2) remand the second above-stated finding to the Board for further proceedings in light of *Boeing Co.*, 365 NLRB No. 154 (2017) (*Boeing*) (revising the Board's standard for determining whether maintenance of a policy that does not expressly prohibit Sec. 7 activity nevertheless violates Sec. 8(a)(1) of the Act). See *Covenant Care California, LLC and Covenant Care La Jolla, LLC v. NLRB*, No. 16–71502 (9th Cir. June 29, 2018).

On February 13, 2019, the Board issued a Notice to Show Cause why the second and sole remaining issue should not be remanded to an administrative law judge for further proceedings in light of *Boeing*, including, if necessary, the filing of statements, reopening the record, and issuance of a supplemental decision. The General Counsel and the Respondents filed statements of position, each opposing remand. Because no party favors a remand and the remaining allegation may be decided based on the existing record, we find that a remand is unnecessary.

The Board has considered its previous decision and the record in light of the General Counsel's and the Respondents' statements of position and has concluded, for the reasons set forth below, that the Respondents' requirement that employees keep information about its arbitral proceedings confidential does not violate the Act.

I. FACTS

At all material times since at least April 10, 2012, Respondent Covenant Care California, LLC, and its wholly owned subsidiary Respondent Covenant Care La Jolla, LLC, have required employees at their skilled nursing and rehabilitation center located in La Jolla, California, to sign a Mutual Arbitration Agreement (Agreement) as a condition of their employment. The Agreement provides, in relevant part: "The proceedings before the arbitrator and any award or remedy shall be of a private nature and kept confidential."

II. DISCUSSION

This case is controlled by the Board's recent decision in *California Commerce Club, Inc.*, 369 NLRB No. 106 (2020), which issued after the February Notice to Show Cause. There, the arbitration agreement at issue provided, inter alia: "The arbitration shall be conducted on a confidential basis and there shall be no disclosure of evidence or award/decision beyond the arbitration proceeding." Id., slip op. at 1. We began our analysis of that provision by observing that "discussing terms and conditions of employment with coworkers 'lies at the heart of protected Section 7 activity.'" Id. slip op. at 3–4 (quoting *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 205 (2007), enfd. 519 F.3d 373 (7th Cir. 2008)). Taking into account the scope of the confidentiality requirement,[1] the employer interests implicated,[2] and the policies of the Act, we assumed, without deciding, that the employer's

[1] Specifically we found that the confidentiality provision at issue was limited in scope in that, when reasonably read, it did not prohibit employees from disclosing "the existence of the arbitration, their claims against the employer, the legal issues involved, or the events, facts, and circumstances that gave rise to the arbitration proceeding." Id., slip op. at 4. Nevertheless, we found that the provision would restrict employees' Sec. 7–protected ability to discuss terms and conditions of employment, including by preventing employees from disclosing to coworkers the outcome of their arbitral proceedings on claims involving workplace issues common to other employees. Id.

[2] We observed that arbitrating disputes on a confidential basis saves resources, protects all parties from reputational injury, and facilitates the cooperative exchange of discovery. Id.

interest in maintaining the confidentiality of arbitral proceedings, though substantial, did not outweigh the impact of the provision on employees' exercise of their Section 7 rights, and that the provision would therefore violate the Act if maintained as an employer-promulgated work rule.[3] Because, however, the disputed provision was contained within an arbitration agreement, we proceeded to analyze whether, under controlling Supreme Court precedent, the FAA shielded the provision from being found unlawful under the Act. We concluded that the FAA shields such provisions to the extent that they specify "'the rules under which [the] arbitration will be conducted,'" but would not shield a provision that imposed confidentiality requirements beyond the scope of the arbitration proceeding and the rules under which it will be conducted. *California Commerce Club*, above, slip op. at 5–6 (quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 479 (1989)). Because we found that the confidentiality provision at issue in *California Commerce Club* was limited to the arbitration proceeding and the rules under which it would be conducted, we concluded that it did not violate the Act. Specifically, we held that "provisions in an arbitration agreement requiring that arbitration be conducted on a confidential basis, including provisions precluding the disclosure of evidence, award, and/or decision beyond the arbitration proceeding, do not violate the Act and must be enforced according to their terms pursuant to the FAA." Id., slip op. at 6.

Here, the confidentiality provision, by its terms, is limited to "[t]he proceedings before the arbitrator and any award or remedy." We have little trouble concluding that, by its terms, the scope of this provision is limited to "the rules under which [the] arbitration will be conducted." See *Volt Information Sciences*, 489 U.S. at 479. Accordingly, we conclude that this provision, like the one at issue in *California Commerce Club*, "falls on the side of the line governed by the FAA" and does not violate the Act. *California Commerce Club*, above, slip op. at 7.[4]

In sum, we find that the confidentiality provision at issue here is shielded by the FAA because it is contained within an arbitration agreement and appropriately limited in scope. Accordingly, we shall dismiss the complaint.

ORDER

IT IS ORDERED that the complaint in Case 21–CA–090894 is dismissed.

Dated, Washington, D.C. June 29, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[3] In *Boeing*, the Board stated that it would determine whether it was lawful to maintain particular rules by balancing the "nature and extent of the potential impact" of the rule on Sec. 7 rights with any legitimate justifications associated with the rule. We declined to do that in *California Commerce Club* with respect to the disputed confidentiality rule because the disposition of the case turned on the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16, not on a balancing of Sec. 7 rights and employer interests.

[4] *California Commerce Club* further explained that, notwithstanding the existence of a confidentiality agreement protected by the FAA, an employer violates Sec. 8(a)(1) if it discharges or otherwise disciplines an employee for discussing terms and conditions of employment where the discussion is protected by Sec. 7. *California Commerce Club*, above, slip op. at 6. No such conduct is at issue in this case.